It follows that my order of the 28th June, 1935 should not have been made, and the judgment entered in pursuance of it should not have been entered. Moreover for the very reason that the judgment of 3rd September, 1934 was correct, the judgment of the 23rd July, is wrong; and *ex debito justitiae* it must be set aside [*Anlaby* v. *Praetorius*, (1888) 20 Q.B.D. 764.]

I therefore set aside the order of 28th June, 1935 and the judgment of 23rd July. It follows that the judgment of 3rd September, 1934 is restored; as it should never have been set aside.

Order accordingly.

Solicitors for the Plaintiff—
Wee Swee Teow & Co.

Solicitors for Tan Khee Mong—
Braddell Brothers.

[ORIGINAL CIVIL JURISDICTION]
TERRELL, J.
August 10, 1935.

RE M. SANDRASAGRAM.

[SINGAPORE BANKRUPTCY No. 135 of 1932]

Ordinance No. 44 (Bankruptcy)—vesting of property.

Under the rules of the provident fund of the Municipality of Singapore both sides of the provident fund namely the contributions side and the donations side *prima facie* vest in the Official Assignee upon the bankruptcy of a member of the fund. Any money added to the fund since the date of the bankruptcy is after-acquired property in the nature of personal earnings.

Motion.

Adityan for the Bankrupt

E. B. Williams, Official Assignee in Person.

The facts and arguments sufficiently appear from the Judgment.

Cur. Ad. Vult.

TERRELL, J.—The question on this motion concerns a bankrupt's interest in his share of the Singapore Municipal Provident Fund, the bankrupt's service with the Municipality having terminated during his bankruptcy. According to the affidavit of A. H. Assiter, the Municipal Treasurer, sworn on 16th July, 1935 the particulars of the Fund are as follows:—

As on 30th June, 1932		
	Contributions side	$1,615.52
	Donations side	$1,638.59
Additions between 30th June, 1932 and 30th June, 1935.		
	Contributions side	724.71
	Donations side	849.67
Present balance to bankrupt's credit		
	Contributions side	340.23
	Donations side	488.26

It will be seen that the fund remaining in the hands of the Municipal Commissioners consists of two parts, the first the bankrupt's own contributions, and the second the Donations of the Municipal Commissioners. The bankrupt obtained payment of $2,000 from each side of the Fund on the 18th day of February, 1935. The Official Assignee was aware that the Municipal Commissioners intended to pay him but according to the practice then prevailing in the Bankruptcy Office the Official Assignee was under the impression that neither part of the Fund vested in him. On January, 23rd, 1935, however, Whitley J. gave Judgment in the case of *In re Daniel* reported in the March, 1935 issue of the Mal.L.J. Vol. IV p.50, and this case is an authority that the contributions side of the Fund vested in the Official Assignee. The bankrupt accordingly makes no claim to the sum of $340-23 remaining to the credit of the contributions side. All that he claims by this motion is the sum of $488-26 which stands to the credit of the Donations side. The case of *In re Daniel* admittedly involved no finding as to the Donations side, but the Official Assignee now submits that the principle of that case is wide enough to cover the Donations side as well. Counsel for the bankrupt relied on the decision of Brown J. in the case of *Re Mohamed Ariff*, 1926 S.S.L.R. p.166. It will be necessary to consider these two cases carefully to see what exactly they decided.

The question in the case of *Re Mohamed Ariff* concerned a Government gratuity under the Pensions (Gratuities) Ordinance 1926 which was payable to the bankrupt who retired from the Government service during the course of his bankruptcy. Section 8 of this Ordinance reads as follows:—

> "No gratuity under this Ordinance shall be liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatsoever."

Another relevant section referred to by the learned Judge is section 55 (3) of Ordinance No. 44 (Bankruptcy) which reads as follows:—

> "Where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half pay or pension or compensation granted by the Government, the Court, on the application of the Official Assignee, shall, subject to the provisions of any enactment for the time being regulating the grant and payment of pensions, from time to time make such order as it thinks just for the payment of the salary, income, half pay, pension or compensation or of any part thereof to the Official Assignee, to be applied by him in such manner as the Court directs."

The learned Judge held that the gratuity was "compensation" within the meaning of section 55 (3) and was accordingly of the opinion

that the gratuity did not "vest" in the Official Assignee under section 24 (4) of Ordinance No. 44 (Bankruptcy), and that but for section 8 of the Pensions (Gratuities) Ordinance, 1926, the Court would on the application of the Official Assignee have to decide what part of the sum in question should be made available for the creditors (See p.168). The result then would have been the same as it is under the English Bankruptcy Act (See *Crowe* v. *Price*, 1889, 58 L.J.Q.B. p.215). He held however that section 8 quoted above precluded the Court from allowing any such application as the Official Assignee could not get the property without making "a claim." The decision of Brown J. accordingly, although he does not expressly say so, involved the finding that the words "attached, sequestered or levied upon" included a claim by the Official Assignee that a gratuity had vested in him by virtue of section 24 (4) of Ordinance No. 44 (Bankruptcy).

The case of *In re Daniel*, IV Mal.L.J. p. 50 involved the construction of section 19 (2) of Ordinance No. 135 (Municipal). This section reads as follows:—

> "No payments or other allowances on death, superannuation, resignation, retirement or discharge made or granted to persons out of a Superannuation and Provident Fund nor the rights of any contributor acquired thereunder shall be assignable or transferable or liable to be attached, sequestered or levied upon for or in respect of any debt or claim whatsoever."

It will be seen that the words "liable to be attached sequestered or levied upon for or in respect of any debt or claim whatsoever" are identical with the concluding words of section 8 of the Pensions (Gratuities) Ordinance, 1926. The Judgment of Whitley J. however at p. 52 reads:—

> "The wording of section 19 (2) of the Ordinance apparently does not contemplate and is not apt to cover the contingency of bankruptcy."

The same words in different statutes should of course be given the same construction, unless the context makes some other construction imperative. Nevertheless, although Whitley J. refers to the case of *re Mahomed Ariff*, he does not point out that he dissents from the construction placed by Brown J. on the words quoted above. Whitley J. also states that the decision of Brown J. is binding only as regards the Donations side of the Provident Fund, but as Whitley J. expressly excluded the Donations side from the purview of his Judgment, this observation must be regarded as purely "obiter."

The duty of the Court when faced with conflicting decisions of Courts of co-ordinate jurisdiction is, I think, clear. Neither decision is strictly binding, although the decision of a court of co-ordinate jurisdiction should generally be followed unless there is good reason to the contrary. On the other hand it is preferable that I should follow the decision of Whitley J. which is given in respect of section 19 (2) of Ordinance No. 135 (Municipal) and which is also the section which I am called on to construe, rather than follow the decision of Brown J. which is given on the construction of similar words in a different Ordinance. In any case I agree with the construction placed by Whitley J. on section 19 (2). To my mind the words "assignable and transferable" refer to the acts of the bankrupt himself while the words "attached, sequestered or levied upon" refer to some process of execution by a creditor.

The word "attached" so far as property is concerned is the word applicable to garnishment which is a process of execution.

"Sequestered" does not occur in the Rules of the Supreme Court, 1934. Under the English Rules and Orders a writ of sequestration is the appropriate form of execution when a person has been ordered to pay money into Court or do any other act within a limited time. (See English Order 43, rule 6).

"Levied upon." These words occur in the writ of seizure and sale, which generally follows the form of the English writ of *Fieri Facias*, though the words do not actually occur in the English writ (but see the heading to Form 2 C App.H. "*Fieri Facias* after levy of part").

All these words therefore are appropriate to different forms of execution, whereas the vesting of the bankrupt's property in the Official Assignee is a different process altogether and the words are not appropriate.

In the case of *In re Daniel* Whitley J. was precluded from making any order giving the Official Assignee control of the Donations side of the Fund, not by the Judgment of Brown J. in the case of *In re Mohamed Ariff* but by the express provision of Rule 19 of the Penang Provident Fund Rules which reads as follows:—

> "No benefit derivable by any contributing member or his representatives from the fund in respect of the donations by the Corporation shall be assignable on the happening of any event whereby the same or some part thereof, if belonging absolutely to such contributing member, would become vested in or payable to some other person or persons, to apply any moneys which may, from time to time, under the scheme become payable to such contributing member out of the donation by the Corporation in such manner as the Com-

missioners may in their absolute discretion think fit for the maintenance, support or benefit of such contributing member and his wife, family, relatives and persons dependent on him or any one or more of them."

This rule gives the Commissioners an absolute discretion whether they pay the Donations side to the Bankrupt or for the support of his family and accordingly this part of the Fund could not vest in the Official Assignee (See *re Samykanoo*, 1927 S.S.L.R. p.34).

In Singapore however the position is entirely different. Rule 22 sub-rule 2 of the Singapore Provident Fund Rules, 1923 provides that a member may retire voluntarily after 10 years continuous approved service, and the bankrupt did resign with the approval of the Commissioners. Thereupon the rule provides "there shall be paid to such members out of the fund the whole of the accounts standing at the time aforesaid to the credit of both parts of his account with the Fund."

It appears to me therefore that accepting as I do the principle laid down in "In re Daniel," both parts of the Provident Fund, so far as Singapore is concerned *prima facie* vest in the Official Assignee.

The Official Assignee admits that any moneys added to the Fund since the date of the bankruptcy are after-acquired property in the nature of personal earnings. It has been held in England (*In re Roberts*, 1900, 1 Q.B. p.122) that personal earnings vest in the trustee in bankruptcy except such part as is necessary for the maintenance of the bankrupt and his family. It is however necessary for the trustee to intervene (See *Williams* p.339) and in the present case the Official Assignee has intervened although at a somewhat late hour and claims what is left of the Provident Fund.

In my opinion he is entitled to both sides of the fund for the benefit of the creditors.

Order accordingly.

Solicitor for the Bankrupt—*W. A. N. Battenberg*

[ORIGINAL CIVIL JURISDICTION]
TERRELL, J.
August 10, 1935.

H. STACEY v. DIAMOND METAL PRODUCTS CO., LTD. & ANOR.

[SINGAPORE IN FORMA PAUPERIS SUIT No. 426 of 1934]

Evidence—Admission of affidavit under Order 35 Rule 1.

After a threat of action, but before the writ, H. on the request of the Defendants made in England an affidavit as to certain matters in issue in the action of which no other person could give evidence for the Defendants. H. died before the issue of the writ.

Held, that the affidavit should not be used as evidence under Order 35 Rule 1 (2) as it was not made in a pending cause or matter and was therefore inadmissible as an affidavit and also because the Plaintiff had no opportunity of cross-examining H.

Adjourned Summonses.

Briggs for Defendants (Applicants).

Gale for Plaintiff (Respondent).

The facts and arguments appear from the judgment.

Cur. Ad. Vult.

TERRELL, J.—This is an application by the defendant that an affidavit of one J. F. S. Hunter, endorsed upon a letter written by Hunter to the first defendant company on the 12th July, 1934, may be received in evidence at the trial of this action in proof of the several facts therein set out. The application is made under Order 35 rule 1 (2) of the Civil Procedure Rules, 1934.

The writ in this action was issued on the 10th August, 1934. Between the date of the letter and the issue of the writ, Hunter died in England. There can, I think, be no doubt that if he had been alive his evidence would have been very material, and the question before the court is whether his previous statement can be accepted in evidence under the provisions of Order 35 rule 1(2).

Generally speaking all evidence at a trial must be given *viva voce* [Ord. 35 r. 1(1)] and the witnesses must be subject to cross-examination in the usual way before the trial Judge. The rules however provide for a certain latitude, and in proper cases witnesses may be examined *de bene esse*, or on commission etc., and their depositions may be read provided that the witness is not available at the trial. It is also provided by Order 35 Rule 1(2) that an order may be made that "any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial on such conditions as the Court or the Judge thinks reasonable."

The authorities which have been cited to me show I think that the part of the rule quoted above (which corresponds with English 0. 37 r. 1) contemplated two different sets of circumstances. The first part deals with the formal proof of some isolated fact; the exercise of the power is discretionary, and in the case of *Cook* v. *Tomlinson*, 24 W.R. 851 where the plaintiff required a will to be proved in solemn form, the President of the Probate Division refused to allow the execution or attestation of the will to be proved by affidavit as he considered that the facts sought to be proved by affidavit were the gist of the action and not isolated facts within the meaning of the Rule.

The second part deals with the admission of affidavit evidence not sworn for the purpose of the trial but sworn in connection with other proceedings. In only one case *Gornall* v. *Mason*, 12